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DATO' TING CHING LEE & ORS v. TING SIU HUA

HIGH COURT SABAH & SARAWAK, KUCHING
ALWI WAHAB JC
[SUIT NO: BTU-23NCVC-1-5-2015]
4 DECEMBER 2015

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CIVIL PROCEDURE: *Striking out – Counterclaim – Application for – Counterclaim for recovery of gambling debt – Whether against public policy and illegal – Whether counterclaim maintainable – Civil Law Act 1956, s. 26(2), (4) - Contracts Act 1950, ss. 24, 31*

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CIVIL PROCEDURE: *Striking out – Counterclaim – Counterclaim made against first plaintiff alone – Whether application to strike out counterclaim could be made against second and third plaintiffs jointly – Whether all plaintiffs entitled to be heard in course of justice – Failure to invoke O. 18 r. 19(1)(a) Rules of Court 2012 – Whether fatal*

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The plaintiffs brought an action against the defendant in relation to defamatory words published by the defendant in the defendant's Facebook and WeChat accounts. The plaintiffs claimed that the defamatory words in their natural and ordinary meaning could be understood to mean that the plaintiffs were dishonest persons who had incurred huge debt and had absconded or refused to honour the debt. The defendant filed his defence and counterclaim against the first plaintiff based on an arrangement between the defendant and one Ting Sing King ('Ting') whereby the defendant had agreed to grant the first plaintiff lines of credits amounting to RM1,500,000 to gamble at Naga Casino, Cambodia. The defendant submitted that it had a further arrangement with Ting to release the first plaintiff his rolling rebate of USD193,800 in the form of casino chips on condition that the first plaintiff would settle the lines of credits totalling USD1,500,000. As such, the defendant counterclaimed against the first plaintiff for, *inter alia*, the said amounts. The plaintiffs *via* encl. 8 applied to strike out the defendant's counterclaim under O. 18 r. 19(1)(b), (c) and (d) of the Rules of Court 2012. The plaintiffs submitted that the defendant's counterclaim by its true nature was for the recovery of gambling debt which the court ought not to grant as it was against public policy and illegal under ss. 24 and 31 of the Contracts Act 1950 and s. 26 of the Civil Law Act 1956. According to the plaintiffs, the alleged agreement was tainted with illegality and thus null and void. The defendant, in opposing the plaintiffs' application, argued that the lines of credits amounting to USD1,500,000 had been fully utilised by the first plaintiff and it became a debt owing to the defendant. The defendant further raised the issues of: (i) whether the plaintiffs' application could be considered as the defendant's counterclaim was directed against the first plaintiff only and (ii) whether the plaintiffs' application could be allowed based on O. 18 r. 19(1)(b), (c) and (d) but not on ground (a) which meant that the plaintiffs had conceded to the defendant's counterclaim that there was a reasonable cause of action.

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Held (allowing plaintiffs' application; striking out counterclaim):

(1) The defendant's counterclaim was expressly framed to seek for the recovery of the lines of credit of USD1,500,000 million and rolling rebates of USD193,800 granted and extended to the first plaintiff solely for the purpose of gambling. The contract entered by the defendant in his capacity as junket for Naga Casino, Cambodia in granting the lines of credits to the first plaintiff through Ting was a gambling transaction which was unenforceable under s. 26 of the Civil Law Act 1956. Sections 26(2) and 26(4) of the Civil Law Act expressly provides that any suit for recovery of gambling debts would be forbidden in Malaysian courts. The defendant's counterclaim to recover gambling debts was therefore not maintainable. (para 26)

(2) There was nothing wrong for the plaintiffs' application to be made jointly to strike out the defendant's counterclaim although the defendant's counterclaim was made against the first plaintiff alone for the recovery of the gambling debt. Both the second and third plaintiffs were parties in this case and were entitled to be heard in the course of justice. This was in light of the serious allegations made against the second and third plaintiffs on their involvement in this case. (para 31)

(3) The plaintiffs could rely on any grounds of O. 18 r. 19(1) of the Rules of Court 2012 in making this application as they were independent from one another. The grounds under paras. (a) to (d) of O. 18 r. 19(1) should be read disjunctively and the plaintiffs were entitled to rely on all or any of the grounds specified thereunder. The failure to invoke ground (a) of O. 18 r. 19(1) was therefore not fatal to the plaintiffs' application. (para 32)

Case(s) referred to:

Burswood Nominees Ltd (formerly Burswood Nominees Pty Ltd) v. Liao Eng Kiat [2004] 2 SLR 436 ***(refd)***

Grosvenor Casinos Ltd v. Datuk Sng Chee Hua (Originating Summons No. 24-61-99) (Unreported) ***(refd)***

Hope v. Hope [1857] 8 De G M & G 731 ***(refd)***

Jupiters Ltd (Trading As Conrad International Treasury Casino) v. Gan Kok Beng & Anor [2008] 7 CLJ 715 HC ***(refd)***

Jupiters Ltd v. Lim Kin Tong [2006] 5 CLJ 277 HC ***(refd)***

Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd & Yang Lain [2000] 2 CLJ 601 HC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 4 CLJ 725 FC ***(refd)***

Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC ***(refd)***

Renaissance Cruises (Malaysia) Sdn Bhd v. Public Bank Bhd; Low Kiow Cheong & Ors Third Parties) [2011] 1 LNS 1452 HC ***(refd)***

A *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong (Sued Pursuant to s. 9(c) of The Societies Act, 1966 In His Capacity As The Chairman Of The Kelab Lumba Kuda Sandakan) [1995] 3 CLJ 256 HC* ***(refd)***
Star Cruise Services v. Overseas Union Bank [1999] 3 SLR 412 ***(refd)***
The Aspinall Curzon Ltd v. Khoo Teng Hock [1991] 1 LNS 6 HC ***(refd)***

B **Legislation referred to:**
Civil Law Act 1956, s. 26(1), (2), (4)
Contracts Act 1950, ss. 24, 31(1)
Reciprocal Enforcement of Judgments Act 1958, s. 5(1)
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)

C Civil Law Act (Cap 43) [Sing], s. 6

For the plaintiffs - Bong Ah Loi (Thien Ling Ying with him); M/s Suhaili & Bong Advocs
For the defendant - Lim Heng Choo (Steven Sia with him); M/s Lim & Lim Advocs

Reported by Suhainah Wahiduddin

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JUDGMENT

Alwi Wahab JC:

Introduction

E **[1]** This is the plaintiffs' notice of application dated 6 July 2015 (encl. 8) to strike out the defendant's counterclaim under O. 18 r. 19(1)(b), (c) & (d) of the Rules of Court 2012.

[2] The action brought up by the plaintiffs against the defendant is in relation to a defamatory words published by the defendant in the defendant's
F Facebook account which the defendant claimed to be what purportedly to be an advertisement appeared in "Sin Chew Daily News" newspaper ("the first said words").

[3] Subsequently, the defendant wrote and published in his WeChat account another defamatory word of the plaintiffs ("the second said words").

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[4] In both the first and second said words, it stated that the plaintiffs are owing to the defendant's company and the plaintiffs are required to appear personally within one week to resolve it failing which action will be taken.

[5] The plaintiffs claimed that the defamatory words in their natural and
H ordinary meaning can be understood to mean that the plaintiffs are totally dishonest and/or untrustworthy persons who had incurred huge debt and have absconded or refused to honour the debt.

[6] The defendant filed his defence and counterclaim dated 25 May 2015 and defendant's counterclaim is based on the following facts:

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(i) the defendant was appointed as a junket pursuant to a joint venture agreement termed as STG Operator Incentive Programme Agreement dated 1 March 2014 between Nagaworld Limited and Huang Yu Kiung to bring in patrons to gamble at the Naga Casino, Cambodia;

(ii) pursuant to the arrangement between the defendant and one Mr Ting Sing King, the defendant had agreed to grant the first plaintiff line of credit amounting to USD1,000,000 based on the agreed exchange rate of USD1 to RM3.60 to gamble at Naga Casino, Cambodia;

(iii) later, the defendant had further arrangement with Mr Ting Sing King to grant the first plaintiff another line of credit amounting to USD500,000;

(iv) the defendant had further arrangement with Mr Ting Sing King to release the first plaintiff his rolling rebate of USD193,800 in the form of casino chips on condition that first plaintiff would settle the two lines of credits totalling USD1,500,000 within three months from 10 January 2015; and

(v) as such, the defendant counterclaims against the first plaintiff (a) the sum of USD1,500,000 (RM5,400,000); (ii) the refund of USD193,800 (RM697,680); (iii) interest at the rate of 5% per annum for USD1,500,000 (RM5,400,000) and USD193,800 (RM697,680) from 14 January 2015 until full and final settlement; (iv) costs; and (v) any other orders that this Honourable Court deems fit.

The Plaintiffs' Submission

[7] The plaintiffs' main ground to support their application is that the defendant's counterclaim by its true nature is for the recovery of gambling debt which the court ought not to grant as it is against the public policy and illegal under ss. 24 and 31 of the Contracts Act 1950 and s. 26 of the Civil Law Act 1956.

[8] Learned counsel for the plaintiffs, Mr Bong Ah Loi submitted that the alleged agreement entered into between the defendant in his capacity as a junket and Mr Ting Sing King to extend line of credit amounting to USD1,500,000 in favour of the first plaintiff and later issued in the form of casino chips, was for the sole purpose of gambling in Naga Casino, Cambodia as expressly pleaded by the defendant in paras. 21 to 22 of his counterclaim.

[9] It was therefore submitted by the plaintiffs that the alleged agreement was tainted with illegality and against the Malaysian public policy, thus null and void under the above provisions.

[10] The plaintiffs found support of their argument on the illegality of the alleged agreement from the case of *Renaissance Cruises (Malaysia) Sdn Bhd v. Public Bank Bhd; Low Kiow Cheong & Ors (Third Parties)* [2011] 1 LNS 1452; [2011] MLJU 1054 where it was held as follows:

> The defendant's submission that the plaintiff's action based on gambling transactions and recovery of gambling debt *per se* is tainted with illegality and in consequence the action is prohibited in law has merits. Support for the proposition is found in Section 26 of the Civil Law Act 1956 and Section 31 of Contracts Act 1950.

[11] The plaintiffs further submitted that it is against the Malaysian public policy to allow recovery of gambling debt in Malaysian courts as decided in *Jupiters Ltd v. Lim Kin Tong* [2006] 5 CLJ 277; [2005] MLJU 534, where His Lordship Ramly Ali dismissed the plaintiff's action and held that an action to enforce gambling debts incurred in a licensed casino in Queensland, Australia in Malaysian court is contrary to public policy. His Lordship referred to the judgment of Turner J in *Hope v. Hope* (1857) 8 De G M & G 731; 44 ER 572 which states as follows:

> I think that, when the Courts of one country are called to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the laws of another country, but if in breach, fraud or evasion of the law of this country, or contrary to its policy, the Courts of this country cannot, as I conceive, be called upon to enforce it.

[12] The plaintiffs then cited the case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong (Sued Pursuant To S. 9(c) Of The Societies Act, 1966 In His Capacity As The Chairman Of The Kelab Lumba Kuda Sandakan)* [1995] 3 CLJ 256 which further affirms that gambling is against the Malaysian public policy as follows:

> It is a notorious fact and I can take judicial notice that the Government of Malaysia wanted nothing to do at all in gaming in so far as that is possible. That was why the government decided not to conduct the lottery tickets themselves. But, simply abandoning gaming would mean leaving it to the realm of the under-world. Instead of that, the government decided to let another group of people in the country run gaming activities legally but the government still shows its disdain for gaming and that is why all betting ticket must bear the words that gaming is illegal under the Islam religion. It can be accepted that generally, the culture of all the races in place-country region Malaysia eschew gaming. What is the attitude of the Court then towards gaming? Without doubt, the Court should show the same attitude of disapproval as that shown by the government and our society. Therefore, the Court must not do anything that can be interpreted as sanctioning or approving gaming.

[13] The plaintiffs further referred to Singaporean's case of *Star Cruise Services v. Overseas Union Bank* [1999] 3 SLR 412, holding the view that gaming or wagering agreement does not have the legal force based on s. 6 of the Civil Law Act of Singapore (which is *pari materia* to s. 26(1) of the Civil Law Act 1956) and as such gives effect to the principle of *nudum pactum* (ie, an empty contract). In that case, the judge stated that gaming debts were not legal debts. The courts were out of bounds to claim based on gaming or wagering because no action could be brought or maintained to enforce them.

[14] Similarly, in describing gambling contract as *nudum pactum*, Abdul Malik Ishak J in *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886; [1999] 5 MLJ 558, held as follow:

> ... A gambling den cannot sue its loser for a gambling debt and neither can a winner claim from the gambling den if he is given a dud cheque … When the second defendant's cruise ship carried out its gambling operations in international waters, it knew that things could go wrong. Things did go wrong and in such a case, no civilised judicial system of law can sit back and smile and act nonchalantly as if nothing has happened. This court must act swiftly and strike down an illegal contract.

[15] The plaintiffs also cited the case of *Jupiters Ltd (Trading As Conrad International Treasury Casino) v. Gan Kok Beng & Anor* [2008] 7 CLJ 715; [2007] MLJU 474, where plaintiffs' cause of action therein is founded on alleged dishonour of six cheques issued by the defendant to settle his gambling losses incurred in a casino ran legally in Queensland, Australia. In concluding that the plaintiffs cannot found this action on the said six cheques, the court held as follows:

> Section 26 of the Civil Law Act and Section 31 of the Contracts Act expressly stipulate that all agreements by way of gaming or wagering shall be null and void. The Plaintiff has admitted in the Statement of Agreed Facts that the cheques were issued for the settling of gambling losses to the Plaintiff. It follows therefore that the cheques were given for no consideration by virtue of Section 26 of Civil Law Act and Section 31 of the Contracts Act. … Thus on the First Issue, it is clear to me that the Plaintiff cannot found its action on the 6 cheques in Malaysian Courts since it is the law that consideration must be lawful at all times, and any illegality of the consideration cannot be ignored.

Defendant's Submission

[16] Mr Lim Heng Choo, learned counsel for the defendant submitted that the two lines of credits amounting to USD1,500,000 and the advance of the rolling rebate granted by the defendant to the first plaintiff to gamble at the Naga Casino, Cambodia was not illegal, and therefore was not against the Malaysian public policy. It was further submitted that the two lines of credits had been fully utilised by the first plaintiff and it became a debt owing to the defendant.

[17] The defendant found support of his argument from the case of *The Aspinall Curzon Ltd v. Khoo Teng Hock* [1991] 1 LNS 6; [1991] 2 MLJ 484; Singapore case of *Burswood Nominees Ltd (formerly Burswood Nominees Pty Ltd) v. Liao Eng Kiat* [2004] 2 SLR 436; and the article by Professor Joseph Kelly which referred to *Grosvenor Casinos Ltd v. Datuk Sng Chee Hua* in Kuala Lumpur (Originating Summons No. 24-61-99).

[18] It was also the defendant's submission that the USD1,500,000 was not the result of a gaming or wagering contract as the counterclaim against the first plaintiff by the defendant did not involve Naga Casino. The full

A utilisation of the two lines of credits in the form of casino chips issued to the first plaintiff occurred prior to the gambling and the winning or losses had nothing to do with the defendant.

[19] The defendant further submitted that the plaintiffs' allegation of illegality on the defendant's appointment as a junket by Huang Group is a B triable issue for this court to hear the evidence at the trial.

Court's Findings

[20] It was the case for the defendant that the facts that the two lines of credits granted to the first plaintiff and the first plaintiff had failed to settle C the said credits despite demands being made by the defendant were not disputed, hence there is a reasonable cause of action. This counterclaim should not be struck out summarily without hearing the merits of the case. This is a clear cut case of default of repayment by the first plaintiff.

[21] It was also the defendant's case that the first plaintiff could not be D allowed to use this country, Malaysia, as a refuge for gamblers who could keep winnings from a gaming or betting activity yet refuse to pay debts on the ground of illegality.

[22] I can't help and quite agree with the defendant's submission that the first plaintiff should be made accountable to the line of credits granted by the E defendant as this was not disputed. Simply put this is a case of sum due and owing by the first plaintiff to the defendant as the result of the two lines of credits utilised by the first plaintiff. However, I found that Mr Bong's submission for the plaintiffs to strike out the defendant's counterclaim has merits. This is because the line of credits does not end there but with the F specific purpose ie, solely for gambling at Naga Casino, Cambodia which makes the transaction illegal under s. 26 of the Civil Law Act 1956 and s. 31(1) of the Contracts Act 1950.

[23] The defendant cannot claim that it was up to the first plaintiff whether the first plaintiff wishes to use the line of credits for gambling purposes and G that he was not involved in the gambling activity to avoid from being caught under s. 26 of the Civil Law Act 1956. Reading from para. 6 of the defendant's affidavit in opposition II, it is crystal clear that the line of credits were granted for specific purpose. The defendant cannot be allowed to blow hot and cold by saying that the lines of credits were granted to the first H plaintiff for gaming at Naga Casino, Cambodia and at the same said the first plaintiff was at liberty not to utilise to gamble in Naga Casino, Cambodia if he so wishes.

[24] For ease of reference para. 6 of the defendant's affidavit in opposition II is reproduced and it is as follows: I

> 6. In reply to paragraph 7 of Ting reply, I would aver that my claim against the 1st Plaintiff is premised on the two lines of credits amounting to USD1,500,000.00 and the rolling rebate of USD193,800.00 to enable the

> 1st Defendant to gamble at the Naga Casino Cambodia. I am verily advised by my advocate that s. 26 of Civil Law Act 1956 does not apply as I am not engaged in gaming or wagering with the 1st Plaintiff. I merely grant two lines of credits to the 1st Plaintiff to gamble at Naga Casino Cambodia which the 1st Plaintiff was at liberty not to utilise the two lines of credits … This is not a gambling transaction but the two lines of credits for the 1st Plaintiff to gamble at Cambodia if he so wishes.

[25] The defendant cannot equate the transaction in this case to an ordinary loan agreement that the first plaintiff could use the money as he so wishes in the light of the defendant's own admission that lines of credits granted were issued in the form of casino chips by one Tan Hui Phin in para. 15 of the defendant's affidavit in opposition I as follows:

> 15. I confirmed with Tan Hui Phin the line of credit agreed by me to be given to the 1st Plaintiff was USD1,000,000.00. As such, Tan Hui Phin issued casino chips of USD1,000,000.00 to the 1st Plaintiff.

[26] From the affidavit evidence, it is very clear that the defendant's counterclaim was expressly framed to seek for the recovery of the lines of credits of USD1,500,000 and rolling rebates of USD193,800 granted and extended to the first plaintiff solely for the purpose of gambling. As such, I am of the view that the contract entered by the defendant in his capacity as junket for Naga Casino, Cambodia in granting the lines of credits to the first plaintiff through Mr Ting Sing King is a gambling transaction which is unenforceable under s. 26 of the Civil Law Act 1956.

[27] Sections 26(2) and 26(4) of the Civil Law Act 1956 expressly provided that any suit for recovery of gambling debts would be forbidden in Malaysian court. The defendant's counterclaim to recover gambling debts is therefore not maintainable (*Jupiters Limited (Trading as Conrad International Treasury Casino) v. Lim Kin Tong* (*supra*)).

[28] To follow the sage words Abdul Malik Ishak J in *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886; [1999] 5 MLJ 558, that it remains as a fact the courts in this country cannot be used by all and sundry for the recovery of gambling debts. It is the duty of this court to see the wood from the trees and when so seen, the actions which are in reality actions culminating from betting transactions between the defendant and the first plaintiff through Mr Ting Sing King should not sustained.

[29] The reliance on *Aspinall Curzon*'s case (*supra*) by the defendant to support his contention that the recovery of the gambling debt is not against Malaysian public policy is misplaced because this case concerns the enforcement of foreign judgment obtained from courts outside Malaysian jurisdiction under s. 5(1) of Reciprocal Enforcement of Judgments Act 1958 while the defendant in the instant case is seeking to recover a gambling debt incurred in a foreign casino in the Malaysian court.

[30] If I am wrong on the above, I would now consider whether the other two grounds relied by the defendant to oppose the plaintiffs' application to strike out are valid. The first ground is whether the plaintiffs' application to strike out can be considered as the defendant's counterclaim is directed against the first plaintiff only. The second ground is whether the plaintiffs' striking out application can be allowed basing on O. 18 r. 19(1)(b), (c) and (d) but not on ground (a) which means that the plaintiffs had conceded to the defendant's counterclaim that there is a reasonable cause of action. This would also mean that there is a triable issue which need to go to trial.

[31] For the first ground, in my view, I don't see there is any wrong for the plaintiffs' application to be made jointly to strike out the defendant's counterclaim although the defendant's counterclaim is made against the first plaintiff alone for the recovery of the gambling debt. In the present case, both the second and third plaintiffs are the parties in this case and they are entitled to be heard in the course of justice. This is particular so in the light of serious allegations made against the second and third plaintiffs on their involvement in this case at para. 24 of defendant's counterclaim (*Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 4 CLJ 725; [2007] 5 MLJ 501).

[32] For the second ground, I agree with Mr Bong's submission that the plaintiffs could rely on any grounds of O. 18 r. 19(1) of the ROC 2012 in making this application as they are independent from one another. The grounds under paras. (a) to (d) of O. 18 r. 19(1) should be read disjunctively and the plaintiffs are entitled to rely on all or any of the grounds specified thereunder (*Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd & Yang Lain* [2000] 2 CLJ 601; [2000] 2 MLJ 38). Mr Bong gave reason why ground (a) of O. 18 r. 19 was not invoked as the plaintiffs intend to use affidavit evidence to support this application. The failure to invoke ground (a) of O. 18 r. 19 is not therefore fatal to the plaintiffs' application.

Conclusion

[33] For all the above considerations, the plaintiffs' application is allowed with costs of RM2,000.